Supreme Court, U.S.
FILED
JUL 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-2089

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

OLYMPIA ROOFING COMPANY, OLYMPIA COMPANY, INC., W.J. MANION, TRAILER-TRUCK BODIES, PARTS AND SERVICE, INC., WEATHERCAP, INC., OLYMPIA SUPPLY COMPANY, INC. and ESTATE OF MARTHA M. AUGUSTIN
Petitioners

v.

C. ELLIS HENICAN AND LAW OFFICE OF HENICAN, JAMES & CLEVELAND
Respondents

SUPPLEMENTAL BRIEF IN SUPPORT OF ORIGINAL PETITION FOR WRIT OF CERTIORARI

W. J. MANION
P. O. Box 1776
Slidell, LA 70459
(504) 649-4000
La. Bar No. 9098

Attorney for Petitioners

27 pg

LIST OF PARTIES AND OTHERS

Pursuant to Supreme Court Rules 21.1(b) and 28.1, counsel for the Petitioners certifies that the following list of persons or corporations either have an interest in the outcome of this case or were parties to the proceeding in the Court whose judgment is sought to be reviewed.

Petitioners/Plaintiffs/Appellants

Olympia Roofing Company, Olympia Company, Inc., W.J. Manion, Trailer-Truck Bodies, Parts and Service, Inc., Weathercap, Inc., Olympia Supply Company, Inc. and Estate of Martha M. Augustin.

Respondents/Defendants/Appellees

C. Ellis Henican, Trustee and Law Office of Henican James & Cleveland

Others

Clerk, Civil District Court, Parish of Orleans, State of Louisiana
Clerk, Louisiana Court of Appeals for the Fourth Circuit
Clerk, Supreme Court of Louisiana
Hon. Revius O. Ortique, Jr., Judge

W.J. MANION, Individually
and attorney of record
for Petitioners
La. Bar No. 9089
P. O. Box 1776
Slidell, LA 70459
(504) 649-4000

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Defendant-respondents have waived filing any brief in opposition to Petition for Writ of Certiorari.

Plaintiff-petitioners respectfully submit this Supplement Brief in support of Petition for Writ of Certiorari.

A recent case, Anderson v. Aetna Life and Casualty, 535 So.2d 1070 (La.App. 2 Cir. 1989), supports this brief. Printing of Anderson v. Aetna Life and Casualty appears in the last issued volume by West Publishing Company, Louisiana Cases, Volume 535 & 536.

I.
REASON FOR GRANTING WRIT

Respondents' motion for summary judgment was heard on April 16, 1987. Commissioner appointed by District Court heard arguments relative to trusteeship of C. Ellis Henican ("Mr. Henican"), respondent, as set forth on Page 26, et seq., of the hearing transcript.

Commissioner refused to rule on breach of duty owed by Mr. Henican as said conduct being controlled by provisions of Louisiana Trust Code, LSA-

R.S. 9:1721, et seq. Therefore, issue of Trust Code violations are not res judicata and is subject to litigation in another prolonged civil suit unless reversal and remand occasions herein.

District Court and Commissioner predicated summary judgment dismissal on the issue that Mr. Henican did not testify falsely under oath on March 4, 1976. This was an issue urged in the original petition, but plaintiffs' Fourth Amended Petition enlarged liability by alleging Mr. Henican's breach of trustee fiduciary duty owed to the petitioners herein. Since petitioners conceded Mr. Henican did not testify falsely at trial, a reversal and remand is in order to try the issue of Trustee's negligence and breach of fiduciary duty owed petitioners.

II.

Louisiana Trust Code is stricti juris. Law applicable to a given case determines what is material fact. Only those facts, having some legal significance, and controlled in some way the legal relations of the parties, are material. Ahten v. Citizens Homestead Association, 163 So.2d 403, 405 (La.App. 4 Cir. 1964); LSA-C.C.P. art. 966.

Mr. Henican's violations of Louisiana Trust Code are not irrelevant or inconsequential matters. Summary judgment, which deprives petitioners of trial on the merits, is not a substitute for a trial. Walmsley v. Gilmore, 144 So.2d 625 (La.App. 4 Cir. 1962).

III.

On September 14, 1955, Mrs. Martha M. Augustin ("Mrs. Augustin"), designated

Mr. Henican as testamentary notary for and executor of her estate, which instrument refers to a buyout agreement between Mrs. Augustin and her son, W. J. Manion ("Mr. Manion"). The agreement was duly signed before Mr. Henican. In the aforesaid agreement, Mr. Henican is designated as Trustee of Mrs. Augustin's property and stock as of September 30, 1955; said agreement being further supplemented on February 14, 1962; on January 15, 1965; and again on March 24, 1965 (Appendix B).

Mrs. Augustin surrendered all of her stock in Olympia Roofing Company and Olympia Waterproofing Co., Inc. to Mr. Henican as Trustee. This was an authentic act of donation purporting to give Mr. Manion an extra portion of Mrs. Augustin's estate, provided buyout

agreement was executed after Mrs. Augustin's death. These provisions were set forth in Mrs. Augustin's olographic will dated September 14, 1955 (Appendix A).

As Trustee, Mr. Henican authored and supervised the employment contracts of Mrs. Augustin, Mr. Manion, and key personnel of Olympia, Messrs. Rappold and Spadafora; the aforementioned being participants in equal shares of profit and drawing commensurate and equal salaries.

Upon Mrs. Augustin's death, buyout agreement was made executory, and Mr. Manion paid his sister, Mrs. McLin, the share interest realized from buyout agreement (Appendix C).

The donative intent of Mrs. Augustin was realized upon rendering judgment of

possession of her estate, thereby consummating intervivos donation and a last will and testament effecting a donation mortis causa. Anderson v. Aetna Life and Casualty, 535 So.2d 1070 (La.App. 2 Cir. 1989), writs denied.

From what has been stated so far, it is obvious that Mr. Henican was a very active Trustee, and that Mrs. Augustin was a very trusting soul.

CONCLUSION

The District Court, in passing on a motion for summary judgment, is not to determine the merits of the issue raised as to the alleged breach of Trustee fiduciary duty owed petitioner, but to determine whether there is a genuine issue of material fact, which burden is carried by the Trustee. The Trustee has not come forward to defend asserted

allegations of negligence. Therefore, trial on the merits is necessary to resolve all disputed facts. Vallier v. Aetna Financial Company, 152 So.2d 112 (La.App. 3 Cir. 1963).

Mrs. Augustin, as both settlor and beneficiary of Trust during her lifetime, had a right to institute a cause of action against Mr. Henican, Trustee, for breach of fiduciary duty owed. This cause of action was a property right. Upon her death, those rights were acquired by her legal and testamentary heir by seizen under LSA-C.C. art. 940 & 943. Since Trust Code is sui generis, any allegation of Trust Code abuses should have been considered by the Court separately.

Mr. Henican should have initiated and prosecuted the breach of contract

action against the City of New Orleans. Prior thereto, he was active for some 18 months trying to get the City of New Orleans to ratify the sale of Square 642. There is no question that Mr. Henican failed to serve as a Trust fiduciary-simply stated, he possessed all stock that was issued (Roofing) and never issued new stock of the viable corporation in the name of Company. LSA-C.C.P. art. 699; LSA-R.S. 9:2222.

State courts have abused constitutional guaranties provided by Fourteenth Amendment, and under statutory authority cited herein, it was manifest error or clearly wrong to grant summary judgment dismissal with such important issues of material fact unresolved, thereby denying legal determination of issues as set forth in Fourth Amended

Petition.

Under legal concept of mitigation, Olympia was required to exhaust all legal means against City of New Orleans before pursuing claim for damages from Mr. Henican. Trier below was required to first determine liability of City of New Orleans for consequences of null sale to Roofing. Once that was decided, liability of Mr. Henican, et al, would be addressed therefore to render summary judgment in favor of Mr. Henican, et al, was premature and improper. Plaintiffs and their counsel truly believe in the merit of their claim against Mr. Henican in the negligence and breach of fiduciary duty he owed as a Trustee.

District Judge denied Olympia a new trial. Summary judgment was granted defendants. The District Court below

would not address the issue of Trusteeship; Court ignored Mr. Henican's deceptive conduct and misrepresentations. District Court denied Mr. Henican had any responsibility for examining instruments relative to the Perry-John Realty, Inc. act of sale. It is urged that such a ruling by District Judge is clearly wrong as Mr. Henican was paid for his services.

It is submitted that District Judge misread Crawford v. Green and Assoc., 493 So.2d 734 (La.App. 2 Cir. 1987), which dealt with attorney's breach of duty owed client. Mr. Henican had a duty to examine indices of public record to determine, prior to trial, the proper corporate entity of Olympia if he could not establish that proof from his own office files.

F.R.C.P. Rule 61, 28 U.S.C.A., sums

up Petitioner's position wherein the courts at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantive rights of the parties. If constituted rights are violated and affected, remand and new trial is mandatory. For the foregoing reasons, it is urged that Writ of Certiorari be issued.

Reversal and remand of this litigation to District Court is urged by petitioners herein.

Respectfully submitted,

W. J. MANION
P. O. Box 1776
Slidell, LA 70459
(504) 649-4000
La. Bar No. 9098
Attorney for Petitioners

APPENDIX A

New Orleans, Louisiana
September Fourteenth 1955

I, Mrs. Martha Penn Manion Augustin, hereby make this my last will and testament; and I revoke any and all wills and codicils heretofore made by me.

I have been married twice, the first time to William Joseph Manion, who died many years ago. And of my first marriage, two children were born, namely: Mary Martha Manion McLin and Dr. William Joseph Manion. My second marriage was to Charles Dupre Augustin, now deceased, and by whom I had no children. I have never adopted any child and I have never been adopted by anyone.

All of the property which I own is my separate and paraphernal property; and the said property includes all of the outstanding stock of Olympia Roofing Company, Inc. and Olympia Waterproofing Company, Inc.

Accordingly, I do hereby will and bequeath all of my stock in the Olympia Roofing Company, Inc. to my son, Dr. William J. Manion, provided the delivery of said share to him shall be subject to his paying to his sister, Mrs. McLin, an amount equal to 1/4 of the actual book value of said shares. The amount to be paid within one year of my death with

interest at 5% per annum from the date of my death, until paid. I shall forthwith confirm these provisions in an agreement with my son which agreement has already been prepared to my satisfaction and is awaiting execution forthwith at completion of this, my said will.

In and to the extent the bequest of this stock shall impinge upon the legitime of my said daughter, my son shall have and is hereby given the absolute and unconditional right to pay to my said daughter, in cash (or in property acceptable to her) whatever amount is necessary in order to make up her legitime, if she has not received sufficient from the bequest made below to constitute her forced portion.

I do hereby will and bequeath the remainder of my estate, including in property possessed by me at time of my death, whether it be real, personal or mixed, and wherever located, unto my said son, Dr. William J. Manion, and my said daughter, Mary Martha McLin, share and share alike and cojointly.

I hereby name my son, Dr. William J. Manion, as my executor with full seizin and without bond. If he should be unable or unwilling to act, I name Mrs. Sarah Penn Strada in his place and trust and under the same conditions.

I name C. Ellis Henican as the attorney and notary of my estate, and if he should be unable to act, I name Murray F. Cleveland in his place and stead.

This entirely written, dated and signed by my own handwriting and in the state aforestated.

(signed) Martha Penn Manion Augustin

FILED MAY 25, 1977
DONNA GRIFFIN, DEPUTY CLERK
JEFFERSON PARISH, LOUISIANA

HENICAN, JAMES & CLEVELAND
Attorneys at Law
Twenty-Sixth Floor
225 Baronne Street
New Orleans 70112

August 31, 1965

CERTIFIED MAIL

Dr. William J. Manion
108 Stella Street
Metairie, Louisiana 70005

Dear Dr. Manion:

We are enclosing the following:

1. Stub for and stock certificate No. 8 for 204 shares of Olympia Co., Inc. issued to Mrs. Martha M. Augustin. Please have Mrs. Augustin sign the receipt on the stub and return the stub and stock certificate to us to be placed in the stock records of Olympia Co., Inc. (now Olympia Roofing Co., Inc.). You will recall that the shares represented by this certificate were included in certificate No. 11 issued when the change of name of the corporation was authorized.

2. Stub for and certificate No. 9 for 196 shares issued to Mrs. Martha M. Augustin. Please have Mrs. Augustin sign the receipt on the stub and send both the stub and stock certificate to us to be

placed in the stock records. The shares represented by this certificate were included in certificate No. 11 issued at the time the name was changed.

3. Stub for and certificate No. 10 for 292-1/2 shares of Olympia Roofing Co., Inc. stock issued to Dr. William J. Manion. Please sign the receipt on the stub and return both the stub and stock certificate to us. The shares represented by this certificate were included in certificate No. 12.

4. Stub for certificate No. 11 covering 400 shares of Olympia Roofing Co., Inc. (formerly Olympia Co., Inc.). Please have Mrs. Augustin sign this stub and return to us. Certificate No. 11 is being held by Mr. Henican as trustee under the agreement dated September 30, 1955, as supplemented on February 14, 1962, January 15, 1965 and March 24, 1965.

5. Irrevocable stock power to be signed by Mrs. Augustin covering the 400 shares held by Mr. Henican under aforementioned agreement as supplemented.

6. Stub for certificate No. 12 for 600 shares of Olympia Roofing Co., Inc. formerly Olympia Co., Inc. Please signed the receipt on the stub and return to us. The stock certificate is being held by Mr. Henican as trustee under the aforementioned agreement and supplements.

7. Supplements dated February 14, 1962, January 15, 1965 and March 24, 1965 to agreement dated September 30, 1955.

8. Our statement covering the costs and fees in connection with the merger and change in name.

The minutes for both companies have been brought up to date and your minute book is now ready to be delivered. Shall I mail the book or will you have someone pick it up?

Very truly yours,

HENICAN, JAMES & CLEVELAND

By
Helene McG. Walker

HMcGW/lfp

Enc.

C-1

SUCCESSION OF
MARTHA PENN MANION AUGUSTIN

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA
NO. 200-902 DIVISION "C"

_____ _____
FILED DEPUTY CLERK

JUDGMENT OF POSSESSION

Considering the petition for possession and the record of this proceeding, satisfactory proof having been submitted to this Court that no inheritance taxes are due by the heirs and that there is no necessity for an administration of this succession, the law and evidence entitling petitioners to the relief prayed for, and for the reasons this day orally assigned:

IT IS ORDERED, ADJUDGED AND DECREED that:

1. William J. Manion and Mary Martha Manion McLin, testamentary heirs and legatees of the olographic will and testament and codicils of decedent filed herein be sent into possession pursuant to the provisions of the testament and codicils for distribution belonging to the succession of the decedent.

2. The only real property of the succession of the decedent is located in Kenner Projects, Parish of Jefferson, State of Louisiana, and as set forth in Descriptive List is more fully described, including but not limited to the property described below:

* * * * * * * * * * *

Olympia Stock
400 shares @ $209.64

* * * * * * * * * * *

The deceased made no donation or transfer of property for an inadequate consideration within one year prior to death, and she did not transfer any property prior to that time in contemplation of death or in avoidance of taxes.

The financial division as to the testamentary heirs is as set forth below:

* * * * * * * * * * *

2. The 100 shares interest in Olympia Roofing Company, Inc., Olympia Company, Inc., and Olympia Supply, Inc., due Mary Martha Manion McLin under terms of this testament and codicils shall be purchased by William J. Manion for $20,964.

* * * * * * * * * * *

4. Upon payment to Mary Martha Manion McLin and acceptance of the sum of $53,097.59 (except Louisiana estate and transfer tax being paid by the legatees separately as their respective interest appear*) by her, William J. Manion shall be responsible for paying Federal Estate Tax and all other costs of this succession proceedings and therefore, William J. Manion shall be deemed possessor of the decedent's entire estate except the Kenner Lots, which are shared in undivided co-ownership of equal value and interest.

Net estate of decedent after taxes and cost	$107,310.18
Value of Olympia Company, Inc. stock	- 83,856.00
Plus Federal Deduction	+ 60,000.00
Subtotal	$83,454.18
1/2 total belonging to Mary Martha Manion McLin	$41,727.09
Minus 1/2 ownership of Kenner Lots	- 18,000.00
Plus William J. Manion's purchase of Olympia Co., Inc. interest	+ 20,964.00
Plus Furniture of decedent	+ 3,839.00
Plus Rugs of decedent	+ 4,567.50
	$ 53,097.59*

5. Upon accepting the terms of this succession, Mary Martha Manion McLin, her heirs and assigns shall have no interest in Olympia Roofing Company, Inc., Olympia Company, Inc., and Olympia Supply, Inc., and further, she shall be relieved of all claims and warranties as to the installation, performance and/or sales of Olympia Roofing Company, Inc., Olympia Company, Inc., and Olympia Supply, Inc., as well as any litigation past, present or future, filed or to be filed, whether Olympia be advocate or cast as a defendant.

All banks, trust companies, insurance companies, and all other persons, partnerships, unincorporated associations, or corporations having on deposit, or in their possession, or under their control any money, credits, stocks, dividends, bonds, or other property depending upon or belonging to the succession of the deceased, Martha Penn Manion Augustin, are hereby required to deliver them to the executor and heirs named above in the proportions fixed by this judgment.

JUDGMENT READ AND SIGNED in Chambers in the City of Gretna, Louisiana, this 1st day of July, 1977.

(Wallace C. LeBrun)
J U D G E